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ONLY)

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INTERSTATE FIRE & CASUALTY COMPANY,
8 an Illinois corporation,

9
10 UNITED STATES DISTRICT COURT
11
12 CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION

13
14 INTERSTATE FIRE & CASUALTY
COMPANY, an Illinois corporation,

15 Plaintiff,
16
17 v.
18
19 PACIFIC EMPLOYERS INSURANCE
COMPANY, a Pennsylvania
corporation,
20
21 Defendant.

22 REPUBLIC WESTERN INSURANCE
COMPANY, an Arizona corporation,
23
24 Plaintiff in
Intervention,
25
26 v.
27
28 INTERSTATE FIRE & CASUALTY
COMPANY, an Illinois corporation;
PACIFIC EMPLOYERS INSURANCE
COMPANY, a Pennsylvania
corporation,
Defendants in
Intervention.

Case No. EDCV06-0593 VAP (OPx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF INTERSTATE FIRE &
CASUALTY COMPANY'S
MOTION TO RETAX COSTS**

Complaint Filed: June 6, 2006
Trial Date: None
Judge: Hon. Virginia A. Phillips

Date: August 31, 2009
Time: 10:00 a.m.
Ctrm: 2

**[Filed concurrently with: Notice of
Motion; Declaration of Todd W.
Baxter]**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF INTERSTATE FIRE &
CASUALTY COMPANY'S MOTION TO RETAX COSTS

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2 **I. INTRODUCTION**
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4 This motion to retax costs follows the July 31, 2009 order of the Clerk of the
5 Court taxing costs in the amount of \$11,029.56 as originally requested on
6 September 13, 2007 by Pacific Employer's Insurance Company ("PEIC") against
7 Interstate Fire & Casualty Company ("Interstate") as it pertains to the action
8 brought by Interstate against PEIC. Interstate objects to the awarding of \$5,132.74
9 in costs as nonawardable under 28 U.S.C. § 1920. Specifically, PEIC cannot
10 recover costs for photocopying documents that were not furnished to the Court or
11 opposing counsel, may not recover costs for photocopying documents that were
12 copied for the convenience of counsel and may not recover costs for deposition
13 transcripts that were not necessarily obtained for use in the case.

14 The main complaint was an insurance dispute between Interstate and PEIC,
15 arising from nine (9) underlying actions. The underlying plaintiffs were passengers
16 on a bus operated by Gonzalez, Inc. d/b/a Golden State Transportation. Golden
17 State Transportation was partially owned by SITA, Inc., a wholly owned subsidiary
18 of Greyhound Lines, Inc. Additionally, Greyhound Lines, Inc. subleased the bus to
19 Gonzalez, Inc. Interstate and Plaintiff in Intervention Republic Western Insurance
20 Company ("RWIC") insured SITA, Inc., Golden State Transportation, and the bus
21 driver, and settled all nine underlying actions on behalf of their insureds. PEIC
22 insured Greyhound Lines, Inc., and did not participate in the settlement.

23 Originally, Interstate filed the present action to obtain reimbursement from
24 PEIC up to its policy limits, but on May 8, 2007, RWIC filed a complaint in
25 intervention against Interstate and PEIC, seeking reimbursement for monies it
26 contributed to the settlement under a CGL policy.

27 Interstate's action against PEIC was resolved in the District Court on
28 August 31, 2007, after the Court granted a motion for summary judgment in favor
of PEIC. Interstate appealed that decision. On July 13, 2009, the Ninth Circuit

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1 Court of Appeals affirmed the District Court's judgment. On July 27, 2009,
2 Interstate filed a petition for rehearing and rehearing en banc, along with a request
3 for certification of issues to the California Supreme Court. That petition is still
4 pending.

5 As noted above, PEIC in its September 14, 2007 Application to the Clerk to
6 Tax Costs requested a total of \$11,029.56 in reimbursable costs. Although the
7 Clerk of the Court taxed the full amount, the entire amount should not have been
8 awarded under 28 U.S.C. § 1920, and Interstate requests that this motion to retax be
9 granted, reducing the award of costs by \$5,132.72, taxing instead a total of
10 \$5,896.84.

11 **II. STANDARDS ON MOTIONS TO RETAX COSTS**

12 Under U.S. District Court for the Central District, Local Rule 54-9, a review
13 of the Clerk's determination of costs may be obtained through a motion to retax
14 costs. Review is limited to the record made before the Clerk. The Clerk's
15 assessment of costs is reviewed by the District Court *de novo*. *In Re Paoli R.R.*
16 *Yard PCB Litig.*, 221 F.3d 449, 461 (3rd Cir. 2000); *Sharon v. Yellow Freight*
17 *System, Inc.*, 985 F.Supp. 1274, 1275 (D. Kan. 1997). In reviewing cost
18 assessments, the District Court must consider whether the costs imposed are
19 allowable, and if so, whether the amount assessed for each particular item is
20 reasonable. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987);
21 *Majeske v. City of Chicago*, 218 F.3d 816, 824 (7th Cir. 2000).

22 **III. PHOTOCOPY EXPENSES**

23 **A. PEIC May Not Recover Costs for Photocopying Documents That**
24 **Were Not Furnished to the Court or Opposing Counsel**

25 PEIC was awarded by the Clerk of the Court expenses in the amount of
26 \$2,395.39 for copying files from the law firm of Varner & Brandt, and \$690.69 for
27 copying files from the law firm of Greene, Broillet & Wheeler. Both law firms
28 represented parties in the underlying actions: Varner & Brandt represented the

1 underlying defendants, and Greene, Broillet & Wheeler represented the Mendoza
2 plaintiffs.

3 Under 28 U.S.C. § 1920(4), items allowable as costs include “Fees for
4 exemplification and copies of papers necessarily obtained for use in the case.” This
5 includes photocopying expenses that are not ultimately used in trial or introduced
6 into the record. *Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc.*,
7 920 F.2d 587, 588 (9th Cir. 1990). However, expenses for photocopying are
8 includable as costs only to the extent that the documents are furnished to the court
9 or to opposing counsel. *United States ex rel. Meyer v. Horizon Health Corp.*, 2007
10 U.S. Dist LEXIS 14521, *13-15 (N.D. Cal. 2007) (the *Haagen-Dazs* ruling does not
11 change the fact that copies are includable as costs only to the extent they are
12 furnished to the court or opposing counsel); see also *Tavarez v. Heckler*, 610
13 F.Supp. 1059, 1064 (S.D.N.Y. 1985) (“Finally, photocopying expenses are
14 recoverable under § 1920 only to the extent that the copies were furnished to the
15 Court or to opposing counsel.”); *Beech Cinema, Inc. v. Twentieth Century-Fox Film*
16 *Corp.*, 480 F. Supp. 1195, 1198 (S.D.N.Y. 1979), aff’d, 622 F.2d 1106 (2nd Cir.
17 1980).

18 In the case of the documents specifically copied from the offices of Varner &
19 Brandt and Greene, Broillet & Wheeler, no copies were ever furnished to Interstate
20 by PEIC. (Baxter Decl., 2:6-11.) To Interstate’s knowledge, none of these
21 documents were ever furnished to the Court. (Baxter Decl., 2:12-14.) Therefore,
22 PEIC should not recover its costs for copying the files from Varner & Brandt and
23 Greene, Broillet & Wheeler.

24 **B. PEIC May Not Recover Costs for Photocopying Documents That**
25 **Were Copied for the Convenience of Counsel**

26 PEIC was awarded by the Clerk of the Court expenses in the amount of
27 \$1,560.64 for copying files from the law firm of Cochran, Cherry, Givens & Smith,
28 and \$690.69 for copying files from the law firm of Greene, Broillet & Wheeler

1 (objected to above on additional grounds). Both law firms represented plaintiffs in
2 the underlying personal injury action.

3 The party seeking reimbursement of its costs must be specific in its
4 description of the documents produced and the purpose of the document
5 production. *El Dorado Irrigation Dist. v. Traylor Bros.*, 2007 U.S. Dist. LEXIS
6 14440, *31 (E.D. Cal. 2007) (it is not sufficient to merely state that copies were
7 “necessarily obtained”). Expenses for copies that are obtained for counsel’s or a
8 litigant’s own use are not includable as costs. *Haroco, Inc. v. American Nat. Bank*
9 *and Trust Co. of Chicago*, 38 F.3d 1429, 1441 (7th Cir. 1994) (set of copies for
10 convenience of attorneys was noncompensable); *McIlveen v. Stone Container*
11 *Corp.*, 910 F.2d 1581, 1584 (7th Cir. 1990) (pleadings copied solely for review by
12 counsel were noncompensable); *Symantec Corp. v. CD Micro, Inc.*, 2005 U.S. Dist.
13 LEXIS 39432, *15 (D. Or. 2005) (costs not allowed when court could not
14 determine what part was for attorney convenience).

15 PEIC states in the Declaration of Marilyn A. Rogers, submitted with its
16 application, that it had “very little information regarding the facts of the underlying
17 cases,” and thus propounded discovery to gather information. Decl. of Rogers, p.
18 2:5. There is no indication that any of the documents obtained from the law firms
19 of Cochran, Cherry, Givens & Smith or Greene, Broillet & Wheeler were ever used
20 other than to merely inform PEIC of the underlying facts. This is akin to the
21 copying of court pleadings for review, which has been described as an expense
22 made for counsel’s convenience. See *McIlveen, supra*, 910 F.2d at 1584. PEIC’s
23 description of the use of these documents, such as it is, precludes recovery of these
24 costs.

25 **IV. DEPOSITION EXPENSES**

26 PEIC has submitted as part of its costs, expenses in the amount of \$319.25
27 and \$166.75 for the deposition transcripts of Charles Norris and Douglas Bell,
28 respectively, as RWIC’s persons most knowledgeable. 28 U.S.C. 1920(2) allows

1 the taxing of costs for a “stenographic transcript necessarily obtained for use in the
2 case.” See *Evanow v. M/V Neptune*, 163 F.3d 1108, 1118 (9th Cir. 1998). The
3 transcripts must be reasonably necessary, and the actual use of the transcript is the
4 most direct evidence of its necessity. *Barber v. Ruth*, 7 Fed.3d 636, 645 (7th Cir.
5 1993); *Ryther v. KARE 11*, 864 F.Supp. 1525, 1534 (D. Minn. 1994). Moreover,
6 the cost of depositions taken purely for discovery or investigative purposes, rather
7 then for trial preparation or trial use, are ordinarily not recoverable. *Coats v.*
8 *Penrod Drilling Corp.*, 5 F.3d 877,891 (5th Cir. 1993).

9 This matter, however, involves two actions: (1) INTERSTATE’s action
10 against PEIC, in which PEIC obtained summary judgment and subsequently filed
11 an application to tax costs, and (2) RWIC’s action against INTERSTATE and
12 PEIC. The depositions of RWIC’s persons most knowledgeable, Norris and Bell,
13 were noticed and taken by INTERSTATE on July 31, 2007 as part of its defense
14 against RWIC’s Complaint in Intervention. (Baxter Decl. 2:15-19.) PEIC had no
15 reasonable use for these transcripts in its defense against Interstate, particularly
16 since it had filed its Motion for Summary Judgment as to Interstate’s complaint in
17 March of 2007, more than four months before these depositions were taken.
18 PEIC’s counsel did not even appear in person for the depositions, choosing instead
19 to appear by telephone. (Baxter Decl. 2:19-20.) Moreover, during the deposition
20 of Douglas Bell, PEIC’s attorney did not ask any questions. (Baxter Decl. 2:21-
21 22.)

22 “Pursuant to § 1920, district courts have equitable discretion to apportion
23 costs between prevailing and nonprevailing parties. This equitable power also
24 includes the power to divide costs among the losing and winning parties in a case
25 involving multiple plaintiffs or multiple defendants.” *Hartung v. Cae Newnes*,
26 2002 U.S. Dist. LEXIS 25525, *6-7 (D. Or. 2002), citing *In re Paoli R.R. Yard*
27 *PCB Litig.*, 221 F.3d 449, 469 (3d Cir. 2000). As the depositions of RWIC’s
28 persons most knowledgeable, Norris and Bell, served no purpose in Interstate’s
5

1 action against PEIC, the Court should separate those costs from the costs that are
2 validly included in relation to Interstate's action against PEIC. Thus, the Court
3 should not award PEIC the costs for these depositions in the total amount of
4 \$486.00.

5 To the extent the Court believes there was some dual purpose for these
6 depositions that relates to PEIC's defense against both Interstate and RWIC, despite
7 the fact PEIC had already filed its Motion for Summary Judgment as to Interstate's
8 complaint at the time of the depositions and clearly did not need, nor used anything
9 from their depositions to support its position, the Court should tax only 50% of the
10 expenses PEIC incurred for these depositions, reducing PEIC's taxable costs by
11 \$243.00.

12 **V. CONCLUSION**

13 For the reasons stated above, Interstate Fire & Casualty Company hereby
14 requests that this Court grant the motion to retax costs reducing the amount of
15 taxable costs awarded by the Clerk of the Court in the amount of \$5,132.72,
16 awarding instead costs totaling \$5,896.84.

17 Dated: August 7, 2009

18 **McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP**

19 By: /s/ Todd W. Baxter

20 James P. Wagoner
21 Todd W. Baxter
22 Paul J. Whitfield
23 Attorneys for Plaintiff
24 INTERSTATE FIRE & CASUALTY
25 COMPANY, an Illinois corporation,

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